Supreme Court, U.S.
FILED
OCT 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-464

In The

Supreme Court of the United States

October Term, 1987

TEXACO INC. and TENNECO OIL COMPANY,

Appellants,

v.

DIRECTOR, DIVISION OF TAXATION, NEW JERSEY DEPARTMENT OF THE TREASURY,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

MOTION OF APPELLEE TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether the Due Process, Commerce, or Equal Protection Clause of the United States Constitution prevents New Jersey from denying a deduction under its corporate franchise tax for the federal crude oil windfall profit tax.

2. Whether New Jersey's denial of a deduction for the windfall profit tax is the equivalent of imposing a severance or excise tax on an out-of-state activity in violation of the Due Process and Commerce Clauses of the United States Constitution.

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Appellee, Director, Division of Taxation, New Jersey Department of the Treasury, respectfully moves pursuant to Rule 16(1)(b) and (d) to dismiss this appeal or to affirm the judgment of the Supreme Court of New Jersey because the issues presented do not raise a substantial federal question and because the decision below was manifestly correct.

COUNTERSTATEMENT

The facts and statutes applicable to appellants Texaco Inc. and Tenneco Oil Company are, in all material

respects, identical to those involved in the appeal of Amerada Hess Corporation and 10 other integrated oil companies in Docket No. 87-453. Consequently, with the exception of reemphasizing certain points, this counterstatement incorporates by reference appellee's counterstatement in its motion to dismiss or affirm in No. 87-453.

Like the Amerada Hess appellants, Texaco and Tenneco mischaracterize the issue at hand as one involving an addition of income to the base of New Jersey's corporation business tax ("CBT") (J.S. 4).[1] As repeatedly pointed out in the State's motion to dismiss or affirm in No. 87-453, the Supreme Court of New Jersey characterized the issue as whether appellants are to be denied a deduction in computing their entire net income (App. 11a).[2] That state law conclusion is not open to question here. Appellants' suggestion that their and others' windfall profit tax ("WPT") liabilities increased substantially in years subsequent to 1980 (J.S. 5, n.8) is misleading. Beginning in 1982, appellants' WPT liabilities and consequently their CBT liabilities attributable to denying a deduction for the WPT decreased substantially as a result of the worldwide drop in crude oil prices. *See* motion to dismiss or affirm in No. 87-453 at 11, n.8. Appellants blatantly misstate the nature of the WPT in maintaining that its incidence is "on the activity of removal. . . ." (J.S. 6). The WPT is imposed, not on the activity of removal, but on the windfall profit which accrues during each taxable

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1 "J.S." refers to Texaco and Tenneco's jurisdictional statement.

2 "App." refers to Texaco and Tenneco's appendix to their jurisdictional statement.

period from the removal of crude oil. *IRC* § 4986(a); *Treas. Reg.* § 51.4986-1.

ARGUMENT

POINT I

PLENARY REVIEW IS NOT WARRANTED BECAUSE THE QUESTION IS NOT SUBSTANTIAL.

Appellee hereby adopts and incorporates the argument set forth in Point I of its motion to dismiss or affirm in No. 87-453.

POINT II

PLENARY REVIEW IS NOT WARRANTED BECAUSE THE SUPREME COURT OF NEW JERSEY CORRECTLY REJECTED APPELLANTS' CLAIMS THAT DENIAL OF A DEDUCTION FOR THE WINDFALL PROFIT TAX IMPOSES NEW JERSEY'S CORPORATION BUSINESS TAX ON EXTRATERRITORIAL VALUES AND DISCRIMINATES AGAINST INTERSTATE COMMERCE.

Appellee hereby adopts and incorporates the argument set forth in Point II of its motion to dismiss or affirm in No. 87-453.

POINT III

PLENARY REVIEW IS NOT WARRANTED BECAUSE DENIAL OF A DEDUCTION FOR THE WINDFALL PROFIT TAX DOES NOT IMPOSE THE CORPORATION BUSINESS TAX ON A VALUE INCIDENT TO AN OUT-OF-STATE ACTIVITY IN VIOLATION OF THE DUE PROCESS AND COMMERCE CLAUSES.

Appellants argue in Point II of their jurisdictional statement that inclusion of the amount of the WPT in

an oil producer's net income extends the reach of the CBT to the value of crude oil attributable to severing it in another state (J.S. 11). Thus, according to appellants, New Jersey is taxing the act of severing crude oil in another state (J.S. 15). Since New Jersey cannot impose a severance tax on the act of severance in another state, it cannot, according to appellants, increase their net income by the amount of the WPT (J.S. 16 to J.S. 17).

Appellants' argument is simply another version of the Amerada Hess appellants' claim in No. 87-453 that denial of a deduction for the WPT constitutes the imposition by New Jersey of its own WPT (cf. No. 87-453, J.S. 20 to J.S. 24), and the State's response is the same. *See* motion to dismiss or affirm in No. 87-453 at 18 to 19. As there stated, the tax base of the CBT is an oil producer's realized gross receipts, less certain deductions, a computation which results in taxable net income. The denial of a deduction may increase the amount of a producer's net income, but it does not alter the character of the CBT base as realized gross receipts less certain deductions and it certainly does not convert the CBT to a severance tax to the extent of the disallowed deduction. The State's schematic bears repeating here. Assume that one of the appellants had gross receipts of $100, deductions including the WPT of $91 and deductions not including the WPT of $90. The appellants' and New Jersey's positions are shown below:

	Appellants	*New Jersey*
Gross receipts	$100	$100
Deductions including WPT	$ 91	
Deductions not including WPT		$ 90
Entire net income	$ 9	$ 10

Denying a deduction for the WPT is obviously not the equivalent of imposing a severance tax on $1, the dollar amount of the WPT. New Jersey is simply denying a deduction in the amount of $1 in determining the company's entire net income.

Since New Jersey is not attempting to reach outside the State to tax a value outside its borders but is merely taxing an apportioned share of the entire net income of appellants' unitary businesses, it is unnecessary to address appellants' argument that a State cannot directly or indirectly tax the act of severance or value attributable to severance occurring outside its borders. *Cf.* J.S. 13 to J.S. 15. For the same reason, the statement in *Commonwealth Edison Co. v. Montana*, 453 *U.S.* 609, 617 (1981), that only one State can tax the act of severing a mineral (J.S. 14) does not aid appellants' argument. To the contrary, *Commonwealth Edison* supports New Jersey's position that a facially nondiscriminatory state tax applied to an activity having a sufficient nexus with the State is not constitutionally infirm although it singles out a particular industry for taxation. Further, *Commonwealth Edison* stands for the proposition that, where a

state tax draws a distinction based on factors other than in-state residence or transactions as opposed to out-of-state residence or transactions, there is no discrimination. 453 *U.S.* at 619.

Appellants' remaining arguments can be disposed of summarily. Since New Jersey is taxing no more than appellants' operating income when it disallows a deduction for the WPT, there is no inconsistency, constitutional or otherwise, between appellants' sales factor and their net income base. (Cf. J.S. 15 to J.S. 16). Appellants' suggestion (J.S. 17, n. 23) that, in denying a deduction for the WPT, New Jersey is taxing gross receipts is another version of the Amerada Hess appellants' "geographic distortion" argument (*Cf.* No. 87-453, J.S. 18 to J.S. 20). The argument derives from the same fallacious notion that denying a deduction for the WPT is tantamount to including an additional item of income or gross receipts in the tax base. Again, however, New Jersey is simply denying a deduction allowed for federal income tax purposes. The remaining amount constitutes appellants' entire net income, not gross receipts.[3]

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[3] As pointed out in the State's motion to dismiss or affirm in No. 97-453 at 7, some of the appellants plainly did not treat the WPT as an item of cost of goods sold, in which event, Texaco and Tenneco's argument that denial of a deduction for the WPT is tantamount to taxing gross receipts lacks even a factual foundation.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed, or the judgment of the Supreme Court of New Jersey should be affirmed.

Respectfully submitted,

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Dated: October 21, 1987